

**Controlled Energy Systems, Inc. and International Brotherhood of Electrical Workers, Local 640, AFL-CIO.** Case 28-CA-13984

May 25, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On January 23, 1998, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent, the General Counsel, and the Charging Party each filed exceptions and supporting briefs, the General Counsel filed an answering brief and the Respondent filed answering briefs and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> only to the extent consistent with this decision.

The judge found, and we agree, that the Respondent violated Section 8(a)(5), (3), and (1) by failing to make timely payments into various union trust funds, failing to remit union dues deducted from employees' paychecks, withdrawing recognition from the Union, laying off employees Jerry Howe, Jeffrey Rasmussen, and Samuel Gladden because of their support for the Union, unilaterally reducing the pay rate of employee Vidal Sianez Jr., interrogating employees about their sentiments toward the Union, and threatening the jobs of union supporters.<sup>3</sup>

<sup>1</sup> Although the Respondent did not except to the judge's finding that its failure to make timely payments into the union's trust funds violated the Act, it did except to his failure to provide "guidance and parameters" regarding the extent of its reimbursement liability. As matters of financial liability are routinely and appropriately addressed during the compliance phase of unfair labor practice proceedings, we find no merit in the Respondent's exception, and note that the reimbursement issues will be fully resolved in compliance.

Among the matters that the Respondent may raise in compliance is whether the settlement of a Federal district court lawsuit over the fund contribution delinquencies can serve as an accord and satisfaction or at least as an offset against its liability for failure to make timely payments to these funds.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We affirm the judge's denial of the Charging Party's request for attorney's fees.

<sup>3</sup> The General Counsel has excepted to the judge's failure to find specifically that the Respondent's president, Vozza, violated Sec. 8(a)(1) by telling employee Wilson that October 25, 1996, would mark the Respondent's last day as a union contractor. The judge makes reference to Wilson's uncontradicted testimony regarding his October 22, 1996, conversation with Vozza in sec. B, 1 of his decision and makes general 8(a)(1) conclusions based on credited employee testimony in sec. B, 5. Since Wilson's uncontroverted version of this conversation establishes that the Respondent thereby violated Sec. (a)(1), we conclude that the absence of an explicit finding of violation was inadvertent, and we accordingly make

The judge dismissed allegations relating to the Respondent's termination of striking employees, on the basis that those employees were not "constructively discharged," as argued by the General Counsel in his posthearing brief. Noting correctly that the doctrine of constructive discharge involves situations in which employees are offered a "Hobson's choice" between sacrificing their jobs or their statutory rights,<sup>4</sup> the judge concluded that, in the absence of evidence that the employees at issue actually quit their employment, they could not be found to have been constructively discharged.<sup>5</sup> Because the employees here had not quit their jobs, but rather were withholding their services by engaging in a strike, the judge concluded that no constructive discharge occurred.

The General Counsel excepts to the judge's finding, arguing that the Respondent unlawfully terminated striking employees in retaliation for their having engaged in an unfair labor practice strike. We find merit in the General Counsel's contention.

The record establishes that on November 5, 1996, following, inter alia, the Respondent's failure to comply with its contractual obligation to provide payments into various union trust funds, its withdrawal of recognition from the Union, and its unilateral decrease of the rate of pay of a unit employee, the Union called a strike against the Respondent. Union officials informed the Respondent on that day that the Union was initiating a strike and the reasons why it was doing so.<sup>6</sup>

With termination slips dated November 5, 1996, each containing the notation "voluntary quit," the Respondent notified striking employees Thomas Sprenkle, Terence Sharkey, Vidal Sianez Jr., Daniel Wilson, and Michael Benson that they were no longer employed by the Respondent.<sup>7</sup> The judge found, and we agree, that the employees did not quit, but rather went on strike.<sup>8</sup>

Based on these facts, it is clear, and we find, that the Respondent terminated these five employees because of their participation in the strike in violation of Section

this finding, and a corresponding modification of the Order. See *Cascade Painting Co.*, 277 NLRB 926 (1985).

<sup>4</sup> *Goodless Electric Co.*, 321 NLRB 64, 67-68 (1996). There is a second branch of the constructive discharge doctrine, although not applicable to this case. A constructive discharge may also occur when, in response to an employee's union activities, an employer deliberately makes working conditions so unbearable that the employee is forced to quit. See, e.g., *Grocers Supply Co.*, 294 NLRB 438 (1989).

<sup>5</sup> *Noel Foods*, 315 NLRB 905 (1994), enf. denied in part on other grounds 82 F.3d 1113 (D.C. Cir. 1996).

<sup>6</sup> The judge found, and we agree, that this was an unfair labor practice strike. The Respondent does not except to this finding.

<sup>7</sup> The complaint alleged the unlawful termination of 20 named employees. The General Counsel presented only five, Sprenkle, Sharkey, Sianez, Wilson, and Benson, as witnesses at the hearing. No evidence was entered into the record regarding any of the other 15 originally-named discriminates. The General Counsel's exceptions relate only to these five discharged strikers. Accordingly, our findings are necessarily limited to these five individuals. The allegations as to the others are dismissed.

<sup>8</sup> The Respondent did not except to this finding.

8(a)(3) and (1) of the Act.<sup>9</sup> We further find that, despite counsel for the General Counsel's mischaracterization of their termination as a constructive discharge, the issue of the employees' discharge was fully and fairly litigated.

The complaint alleged, *inter alia*, that on or about November 5, 1996, the Respondent "caused the termination" of 20 named employees because of their Union or other concerted, protected activities and that such conduct violated Section 8(a)(3) and (1) of the Act. The term "constructive discharge" does not appear in the complaint. At the hearing and in its posthearing brief, the Respondent never contested the relevant facts underlying the discharges of the five employees who testified: the five employees engaged in a strike on November 5, and the Respondent on that same date issued them termination slips. Further, the Respondent did not contest the fact that the strike was the motivating reason behind the issuance of the termination slips. To the contrary, the Respondent's defense was predicated on its contention that the strike was illegal under the "no strike" provision of the parties' collective-bargaining agreement.<sup>10</sup>

Under these circumstances, we find that the record fully supports the allegation of the complaint that the Respondent unlawfully "caused the termination" of the five strikers and that the Respondent has not been denied procedural due process by the General Counsel's mischaracterization of the complaint allegation as a "constructive discharge."<sup>11</sup>

#### AMENDED CONCLUSION OF LAW

Substitute the following for the judge's Conclusion of Law 4.

"4. By laying off employees Jerry Howe, Jeffrey Rasmussen, and Samuel Gladden, because they elected to remain members of and continue their support for the Union, and by terminating striking employees Thomas Sprenkle, Terence Sharkey, Vidal Sianez Jr., Daniel Wilson, and Michael Benson because they engaged in union or other protected concerted activities, the Respondent violated Section 8(a)(3) and (1) of the Act."

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Controlled Energy Systems, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Failing to make timely payments to the union's trust funds.

(b) Failing to make timely payments to the Union of money collected from unit employees.

(c) Withdrawing recognition from the Union and repudiating the collective-bargaining agreement between NECA and the Union to which Respondent is a signatory.

(d) Unilaterally reducing the wages of a bargaining unit employee.

(e) Laying off employees because they elect to remain members of and to continue their support for the Union.

(f) Discharging employees because they engage in a strike or other protected concerted or union activity.

(g) Interrogating employees about their union sympathies and their desire to remain with the Company after it goes nonunion and threatening to discharge employees who support the Union.

(h) Informing unit employees that it would become a nonunion employer.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jerry Howe, Jeffrey Rasmussen, Samuel Gladden, Thomas Sprenkle, Terence Sharkey, Vidal Sianez Jr., Daniel Wilson, and Michael Benson, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, discharging if necessary any employees hired to replace the discriminatees, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(b) Make Jerry Howe, Jeffrey Rasmussen, Samuel Gladden, Thomas Sprenkle, Terence Sharkey, Vidal Sianez Jr., Daniel Wilson, and Michael Benson, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs and discharges and, within 3 days thereafter, notify the discriminatees in writing that this has been done and that the layoffs and discharges will not be used against them in any way.

(d) At the Union's request, rescind the unilateral changes the Respondent made in terms and conditions of employment of the unit employees.

(e) Make the employees whole, with interest, for any losses of pay or benefits they may have suffered as a result of the Respondent's unilateral changes, and for any expenses they may have incurred as a result of the Respondent's failure to make the required payments into the union pension and health plans, and other trust funds in the manner described in the remedy section of this decision.

<sup>9</sup> See, e.g., *Modern Iron Works*, 281 NLRB 1119 (1986); *Centurion*, 304 NLRB 1104 (1991); *Matador Lines, Inc.*, 323 NLRB 189 (1997).

<sup>10</sup> The Respondent raised the same contention with regard to the layoffs of Howe, Rasmussen, and Gladden, which were also alleged in the complaint to have violated Sec. 8(a)(3) and (1). In finding that these three layoffs were unlawful, the judge found no merit in this and, as noted above, we adopt the judge's finding for the reasons stated by him.

<sup>11</sup> Since we find that the complaint did not allege that these strikers were constructively discharged, we find it unnecessary to grant the General Counsel's motion to amend the complaint.

(f) Reimburse the union pension and health care plans, apprentice funds, receiving and administrative fund and the national electrical benefit fund, with interest, for unpaid contributions to those plans, and reimburse the Union for any delinquent payments of union dues, also with interest, which were collected but not forwarded to the Union.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back-pay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Phoenix, Arizona, copies of the attached notice marked "Appendix."<sup>12</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1996.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

#### APPENDIX

##### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to make timely payments to the union's trust funds.

WE WILL NOT fail to make timely payments to the Union of funds we collected from employees for union dues.

WE WILL NOT withdraw recognition from the Union or repudiate the collective-bargaining agreement between NECA and the Union to which we are a signatory.

WE WILL NOT make unilateral changes in the terms and conditions of employment of employees represented by International Brotherhood of Electrical Workers, Local 640, AFL-CIO in the bargaining unit described in the section entitled "Coverage" of the inside agreement between the Arizona Chapter (National Electrical Contractors Association, Inc.) and Local Union 640 (IBEW) that expired on September 1, 1997.

WE WILL NOT lay off our employees because they elect to remain members of and continue their support for the Union.

WE WILL NOT discharge or otherwise discriminate against employees because they engage in a lawful strike.

WE WILL NOT interrogate our employees about their union sympathies and their desire to remain with the Company after it went nonunion nor threaten to discharge employees who supported the Union.

WE WILL NOT inform unit employees that we will become a nonunion employer.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Jerry Howe, Jeffrey Rasmussen, and Samuel Gladden immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits resulting from their layoffs, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the layoffs of Jerry Howe, Jeffrey Rasmussen, and Samuel Gladden, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the layoffs will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's order, offer Thomas Sprenkle, Terence Sharkey, Vidal Sianez Jr., Daniel Wilson, and Michael Benson, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharges of Thomas Sprenkle, Terence Sharkey, Vidal Sianez Jr., Daniel Wilson, and Michael Benson, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

<sup>12</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, at the Union's request, rescind the unilateral changes we made in the terms and conditions of employment of a unit employee.

WE WILL make our employees whole, with interest, for any losses of pay and benefits they may have suffered as a result of our unilateral changes in their terms and conditions of employment, and for any expenses they may have incurred because of our failure to make the required contributions to the union's fringe benefit plans.

WE WILL reimburse the union's pension and health care funds, apprentice funds, receiving and administrative fund, and the national electrical benefit fund for all unpaid contributions, with interest.

WE WILL reimburse the Union for any unpaid money we collected from our employees for union dues.

### CONTROLLED ENERGY SYSTEMS, INC.

*Richard A. Smith, Esq.*, for the General Counsel.

*Bradley D. Gardner, Esq.*, of Phoenix, Arizona, for the Respondent.

*Steven Speer, Business Manager, IBEW*, and *Stanley Lubin and Nicholas Enoch, Esqs.*, on the brief, all of Phoenix, Arizona, for the Charging Party.

### DECISION<sup>1</sup>

#### STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Phoenix, Arizona, on June 10 and 11, 1997,<sup>2</sup> pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 28 on December 27, and which is based on a charge filed by International Brotherhood of Electrical Workers, Local 640, AFL-CIO (the Union) on November 5. The complaint alleges that Controlled Energy Systems, Inc. (the Respondent), has engaged in certain violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).

#### Issues

1. Whether respondent violated Section 8(a)(1) and (5) of the act by committing one or more of the following acts
  - (a) By withdrawing recognition from the Union as the exclusive collective-bargaining agent of an appropriate unit and repudiating the collective-bargaining agreement.
  - (b) By failing and refusing to make monthly payments to one or more of the union's trust funds.
  - (c) By failing and refusing to forward to the Union, moneys deducted from he wages of unit employees for union dues payments.
  - (d) By unilaterally reducing the pay of a unit employee.
2. Whether respondent violated Section 8(a)(1) and (3) of the act by laying off three unit employees and by causing the termination of 20 other unit employees
3. Whether respondent violated Section 8(a)(1) of the act by committing one or more of the following acts
  - (a) Through its president Voza, by threatening to discharge unit employees because of union membership.

<sup>1</sup> Without objection, the General Counsel's motion to correct record is granted.

<sup>2</sup> All dates refer to 1996 unless otherwise indicated.

(b) By Voza telling unit employees that Respondent's last day as a union contractor would be October 25.

(c) By Voza on several different occasions, interrogating unit employees concerning their support and sympathies for the Union.

(d) By Voza conditioning continued employment for unit employees on nonmembership in the Union.

(e) Through its supervisor Linus Belanger, on two separate occasions, by interrogating employees concerning their support and sympathies for the Union.

(f) By Belanger threatening employees that the Respondent would discharge union supporters.

(g) By Voza changing the work location of an employee to isolate him from members of the Union.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, the Charging Party Union, and the Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

### FINDINGS OF FACT

#### I. RESPONDENT'S BUSINESS

Respondent admits that it is an Arizona corporation engaged in the electrical contracting business and having an office and place of business located in Phoenix, Arizona. It further admits that during the past 12-month period ending November 5, in the course and conduct of its business, it has purchased and received at its projects located within the State of Arizona goods and materials valued in excess of \$50,000 from other suppliers, including Border States Electric Supply, located within the State of Arizona, each of which other suppliers has received these goods directly from points located outside the State of Arizona. Accordingly, Respondent admitted at hearing (Tr. 19), and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that International Brotherhood of Electrical Workers, Local 640, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. Facts

##### 1. Overview

On or about November 4, 1995, Respondent's president, Andrew L. Voza, executed a letter of assent A (GC Exh. 3), the effect of which was to bind Respondent to the collective-bargaining agreement between the Union and the Arizona Chapter of the National Electrical Contractors Association, Inc. (NECA). This bargaining agreement described as an "Inside Agreement" was effective between September 1, 1994, and September 1, 1997 (GC Exh. 4). During all times material to this case, Respondent was a party to and subject to said collective-bargaining agreement.

Among other aspects of the employer-employee relationship, the bargaining agreement required Respondent to submit every month, certain payments to the union's trust funds and to seek new employees first from the union's hiring hall before turning to other sources of labor. A grievance-arbitration clause was available for the resolution of contractual disputes. It is undis-

puted that Respondent failed to perform certain of its duties required by the bargaining agreement.

## 2. Background on Respondent

Sometime in the late 1960s or early 1970s Vozza graduated from college with a degree in electrical engineering. Thereafter, in Fresno, California, between 1967–1971, Vozza served a 4-year apprenticeship training course under the industry's joint (Employer-Union) apprentice training (JAT) program. At the end of the JAT program, Vozza passed a test for admission to the classification of journeyman wireman. In March 1972 Vozza became a foreman of an electrical construction crew and continued in that job until June 1976, when Vozza went into business for himself as an electrical contractor.

For the first 2 years, Vozza operated a nonunion company. Then in 1978 Vozza signed a letter of assent A with an IBEW located in Fresno. Vozza's Fresno business, American Electric Co., has operated continuously since that time as a union signatory employer. In 1979 Vozza joined the Eastern Central California Chapter of NECA and served as the Chapter's vice president in 1981, and its president, during 1982–1983. In 1988 Vozza was president again for a year. During the entire time Vozza has been a member of NECA in the Fresno area, he has served on the Chapter's board of directors for several years and on two or three different NECA negotiating committees.

In November 1994 Vozza incorporated Respondent, and on February 1, 1995, business actually commenced performing commercial bid and specialty work in the area of electrical construction. At first, Vozza obtained his employees from ads in newspaper or from employment agencies, but these methods were not satisfactory. Partly to ensure a steady source of competent and reliable journeymen and possibly for other reasons as well, Vozza signed the letter of assent referred to above.

Respondent's work was substantial and included certain high profile jobs such as remodeling of the Arizona Governor's office. At some point, disputes arose in several of Respondent's jobs between the architect/engineers on the one hand and Respondent on the other. These disputes required the general contractor to intervene and resolve the disputes. In other cases, the general contractor found its clients to be slow pay. All of these problems affected Respondent's cash flow in the short run and, as a result, Vozza began to fall behind on his payments to the union's trust accounts for employee benefits. The various trust accounts and the monthly amount required to be paid per employee hour of work were, the health & welfare trust (\$1.66), the pension trust (93 cents), apprentice fund (13 cents), the receiving and administration fund (10 cents), and finally national electrical benefit fund (3 percent of gross hourly wage).

To complicate Respondent's position further, all or most of its contracts to perform work contained a standard liquidated damages clause requiring Respondent to pay a penalty of between \$1000 to \$1500 per day for tardy completion of the work in question.

## 3. Union's response to Respondent's failure to make timely trust fund payments

The General Counsel called Steven Speer, the union's business manager/financial secretary after July, to testify about the union's experience in attempting to resolve Respondent's delinquencies. First Speer held a series of meetings with Vozza where Speer pointed out that the Union had available a so-called "72 hours clause" whereby it was authorized under the declaration of trust, article 4, to pull its members off Respondent's projects for non-

payment of trust moneys. One such notice was given on August 12 (GC Exh. 9) and another on August 20 (GC Exh. 10). However, no strike occurred during the summer as the Union felt such tactic would be counter-productive.

When meetings and the 72-hour clause failed to produce the desired results, Speer involved the grievance/arbitration clause under the collective-bargaining agreement. Written notice was provided Vozza on August 29 of a labor/management grievance hearing on the following day (GC Exh. 11). On August 30 three management and three labor representatives convened for hearing of the union's grievance against Respondent for non-payment of trust fund benefits, and union dues as well, which Respondent had not been sending to the Union. Despite Vozza's phone call to the tribunal stating that, although he was running late, he would be present, Vozza never did appear. The labor/management committee issued its judgment that Vozza and Respondent were in violation of various articles and sections of the inside construction agreement as alleged by the Union (GC Exh. 12). Speer notified Vozza of the results and Vozza promised to resolve the matter as soon as possible.

On October 18 the Union sent still another 72-hour letter to Respondent (GC Exh. 13). At this point, Vozza was 90 days behind on his trust fund payments and was approaching 120 days delinquency. On October 22 Vozza met with Speer and another union official. Vozza recited again his problems with slow pay general contractors. Speer proposed certain remedial possibilities to ensure the Union and Respondent would be able to continue their relationship. For example, Speer proposed that Vozza might wish to downsize his company, or Speer could become a trustee of the delinquent trust funds to argue in that capacity for a mutually acceptable repayment plan for Respondent. However, the meeting ended with Vozza unable to commit to any type of acceptable action. Vozza did, however, promise to provide a proposal to the Union by the end of the week.

While all of this was occurring, an issue arose as to exactly how much Respondent owed the trust funds and the Union for dues payments. Both the trust funds and Respondent itself performed audits of Respondent's books and records to find out this figure. The trust fund audit was given to Vozza at the October 22 meeting referred to above. According to a summary entered into evidence, the trust fund audit claimed Respondent owed about \$145,000 for the trust fund and about \$46,000 on delinquent union dues (R. Exh. 1). Respondent's own audit shows the amount to be less (R. Exh. 3). In any event, in early November, the Union and its trust funds filed a lawsuit in U.S. District Court (R. Exh. 2). In March 1997 the case was settled for \$110,000. This was an amount substantially less than the \$150,000 initially claimed by the Union.

## B. Analysis and Conclusions

### 1. Respondent's failure to make timely payments to the union's trust funds

I find that the General Counsel has established violations of Section 8(a)(1) and (5) of the Act by Respondent's failure to make timely payment to the applicable union trust funds and by Respondent's failure to forward to the Union, moneys deducted from the wages of unit employees for union dues payments. It does not appear that Respondent disputes this initial violation as one searches its brief in vain for any discussion of the issue. Based on the authority of *Morelli Construction Co.*, 240 NLRB 1190 (1979), cited by the General Counsel, I note that

[A]n employer acts in derogation of its bargaining obligation under Section 8(d) of the Act, and thereby violates Section 8(a)(5) of the Act when during the life of a collective-bargaining agreement between it and a union, it unilaterally modifies or otherwise repudiates terms and conditions of employment contained in the agreement. It is equally well established that economic necessity is not cognizable as a defense to the unilateral repudiation of monetary provisions in a collective-bargaining agreement.

See also *King Manor Care Center*, 308 NLRB 884, 887 (1992), and *Merryweather Optical Co.*, 240 NLRB 1213, 1215 (1979).

In light of this authority, it makes no difference that Respondent's failure to make timely trust fund payments and timely dues payments was based on financial hardship which may have been caused by factors outside its control. The Union demonstrated a surprising degree of tolerance for Respondent's financial hardship and perhaps this attitude might continue if compliance proceedings are warranted.

The General Counsel also contends, without argument to the contrary from Respondent, that Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union, and I so find. At a meeting on October 22 between Vozza and Speer, Vozza told Speer he desired to disassociate himself from the Union. This same message was conveyed by Vozza to certain bargaining unit employees. For example, according to the General Counsel's witness Daniel Wilson, Vozza told him on October 22, at the worksite, the Orpheum Theater in downtown Phoenix, that Vozza was getting out of the Union. On the same day, Vozza conveyed the same message to the General Counsel's witness, Michael Benson. On the following day, Vozza told the General Counsel's witness Samuel Gladden that Vozza was dropping out of the Union. Finally, on October 26 Vozza told the General Counsel's witness Terrance Sharkey that he would be going nonunion "soon."

Vozza's foreman at the Orpheum was Linus Belanger, I find, contrary to Belanger's testimony, that on October 23, in the basement of the Orpheum, he talked to the General Counsel's witness Jeffrey Rasmussen, telling him that Andy (Vozza) was going nonunion and asking Rasmussen if he desired to stay as a nonunion hand. These facts show that Respondent withdrew recognition from the Union and repudiated the collective-bargaining agreement. *American Thoro-Clean Ltd.*, 283 NLRB 1107, 1109 (1987). See also *Tri-County Electric*, 324 NLRB No. 115 (1997) (not reported in bound volume).

## 2. Respondent's alleged unlawful layoffs of Howe, Rasmussen, and Gladden

The General Counsel's witness Jerry Howe worked for Respondent as a journeyman electrician between September 1995 and November 1996. On October 23, Howe was told by Belanger that he was laid off as the company was getting rid of all strong union hands. Howe then received a layoff slip marked as a reduction in force (GC Exh. 2).<sup>3</sup>

With respect to Rasmussen and Gladden, Respondent contends that they were not laid off at all, but left work to engage in a strike prohibited by the collective-bargaining agreement

(brief, et. seq.). This contention is contrary to the evidence. I credit Gladden who testified that on October 25 he talked to Belanger who asked if Gladden had made a decision about staying with the Union or with Respondent as a nonunion employee. This choice had been put to Gladden 2 days earlier by Vozza. When Gladden told Belanger that he decided to stay with the Union, Belanger replied that he was sorry to hear that. This same series of events happened to Rasmussen as well and he, like Gladden, told Belanger that he desired to remain with the Union. The afternoon of October 25, Vozza met with both employees to tell them they were terminated. Vozza gave Gladden a notice of termination which had voluntary quit checked (GC Exh. 22). When Gladden protested that this was not accurate, Vozza changed it to a reduction in force (GC Exh. 23). Rasmussen also protested the voluntary quit on his termination slip (GC Exh. 24) and again Vozza changed it to read "Reduction In Force" (GC Exh. 25).

I begin by rejecting Respondent's claim that Gladden and Rasmussen left to go on strike. The strike did not begin until November 5/6, several days after they were laid off. The evidence shows that Gladden, Rasmussen, and Howe were all laid off because they elected to remain with the Union. Respondent had no legal right to present the bargaining unit employees with that choice. I find under *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), that the General Counsel has presented a strong prima facie case that the three employees were laid off because of their membership in and support for the Union. Respondent has failed to rebut the prima facie case by credible evidence. Accordingly, I find that Respondent violated Section 8(a)(1) and (3) of the act by laying off Gladden, Rasmussen, and Howe as alleged. *American Automatic Fire Protection, Inc.*, 302, NLRB 1014 (1991).

## 3. Alleged constructive discharge of 20 Respondent employees

At pages 17–20 of his brief, the General Counsel argues that 20 of Respondent's employees were constructively discharged in violation of the Act. Of this group, five employees testified as the General Counsel's witnesses: Terrance Sharkey did not voluntarily quit, but joined the strike on the afternoon of November 5 (GC Exh. 27). The notice of termination given to Sharkey showing voluntary quit was not correct (GC Exh. 28). Thomas Sprenkle did not quit but joined the strike on November 5 (GC Exh. 30). A termination slip (GC Exh. 29) prepared by Vozza showing a "voluntary quit was not correct (Tr. 168); Daniel Wilson did not voluntarily quit and his termination slip of November 5 which he never saw before hearing, showing voluntarily quit was not correct (GC Exh. 18). Wilson joined the strike as of November 6 (GC Exh. 19); For Michael Benson, the record shows two termination slips, one dated October 15 and the other dated November 5 (GC Exh. 20). In neither case did Benson quit although the November 5 slip mistakenly shows a voluntary quit checked. Benson joined the strike and notice to that effect was sent to Respondent on November 6 (GC Exh. 21). Finally, as to Vidal Sianez, he was given a termination slip with his final paycheck and it erroneously shows voluntary quit as of November 6 (GC Exh. 16). A note from the Union sent to Respondent on the same day shows that Sianez joined the strike (GC Exh. 17).

The doctrine of constructive discharge applies where employees are offered a Hobson's choice between continued employment but only if employees abandon, "rights guaranteed

<sup>3</sup> There is an issue regarding how much work remained to be completed when Howe was laid off. He had been working as a troubleshooter on Strand Lighting at the Orpheum Theater. This question can be resolved at compliance.

employees under the Act.” For example, where employees are allowed to continue working only if they accept unlawfully formulated and implemented terms and conditions of employment, or are compelled by their employer to abandon existing union representation entirely, employees’ rejections of these choices constitute constructive discharge. *MDI Commercial Services*, 325 NLRB 53, 64 (1997). See also *Goodless Electric Co.*, 321 NLRB 64, 67–68 (1996).

I continue my analysis with the case of *Noel Foods*, 315 NLRB 905, 909 (1994), *enfd.* in part 82 F.2d 113 (D.C. Cir. 1996), where the Board stated,

Although it is unlawful for an employer to force his employees to abandon either their bargaining representative or their jobs, an employee who is presented with that choice nevertheless is not constructively discharged unless he does, in fact quit. With few exceptions, the Respondent’s employees did not quit. Many of them participated in the strike, but striking is not the same as quitting. . . .

There is no evidence that Respondent’s 20 employees quit; instead they went on strike. Accordingly, based on the authority quoted above, I will recommend that this allegation be dismissed.<sup>4</sup>

To avoid confusion, I make additional findings: that the strike which began on November 5/6 is an unfair labor practice strike because one of its objectives was to protest Respondent’s unfair labor practices. *Kosher Plaza Supermarket*, 313 NLRB 74, 88 (1993); *R & H Coal Co.*, 309 NLRB 28 (1992). Here employees were protesting Respondent’s failure to make timely trust fund payments and its repudiation of the labor agreement and withdrawal of recognition from the union. Respondent’s contention that the strike was unlawful because the collective-bargaining agreement contained a no-strike clause must be rejected. The unfair labor practices found herein and against which the strike was a protest were and are serious unfair labor practices. Accordingly, the no-strike clause does not apply. *Goodie Brand Packing Corp.*, 283 NLRB 673, 674 (1987); *El San Juan Hotel*, 289 NLRB 1453, 1456 fn. 10 (1988).

#### 4. Alleged unilateral reduction of a bargaining unit employee’s wage

The General Counsel’s witness, Vidal Sianez Jr. was hired by Respondent in September as a journeyman electrician at the rate of \$15.90/hr. Until November 1, he was paid weekly at the correct rate. Vozza testified that he had allegedly received periodic reports from foreman to the effect that Sianez was not qualified to perform journeyman electrician’s work. On or about November 1, a Friday, Sianez called Vozza to request his paycheck early so he could pay his rent, Vozza agreed, but did not tell Sianez nor give notice to the Union nor bargain with the Union that Vozza would cut Sianez’ wages to \$8 per hour. Sianez did not discover the pay cut until he arrived home on Friday evening after Respondent’s office had closed for the weekend. On Monday, November 4, Sianez called Vozza regarding the shortfall. The latter explained that Sianez would have to take a test to measure his competency, but the test wasn’t prepared yet. In the meantime, Sianez requested a “loan” of about \$200 to tide him over to the next payday. Vozza agreed but the loan has never been repaid. According

to Sianez, Vozza still owes him \$20 to \$30, i.e., the difference between his proper rate of pay minus what he did receive plus the \$200 loan.

I find that by unilaterally reducing the wages of Sianez, Respondent has violated Section 8(a)(1) and (5) of the Act. *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973), *enfd.* 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975). Based on this authority, it is unnecessary to consider the bona fides of Vozza’s reasons for cutting the pay of Sianez, a bargaining unit employee. Vozza was required to give appropriate notice to the Union, and on demand, bargain with it over the issue of a payout for any bargaining unit employees or all bargaining unit employees. See *Williams’ Pipeline Co.*, 315 NLRB 630, 631 (1994).<sup>5</sup>

#### 5. The alleged unlawful interrogations and other alleged miscellaneous violations

Many of the violations found above also constitute unlawful interrogations or statements. Accordingly, I find that it was coercive for Vozza to ask employees if they wished to remain with the Company after it went nonunion, and that any such employment would be conditioned on the employee’s non-membership in the Union. *Prineville Stud Co.*, 578 F.2d 1292, 1294 (9th Cir. 1978); *Rossmore House*, 269 NLRB 1176 (1984), *affd.* 760 F.2d 1006 (9th Cir. 1985). See also *National Roof Systems*, 305 NLRB 965, 970–971 (1991), and *Kamminga & Roodvoets, Inc.*, 198 NLRB 208 (1972). I also find that Respondent violated Section 8(a)(1) of the Act when Belanger made threats to discharge union supporters.

The General Counsel contends that Benson was transferred to another jobsite because Benson told other employees about Respondent’s plan to go nonunion. It is true that Vozza told Benson on October 22 about Respondent’s plan to go nonunion, just as Vozza told many other employees. Vozza added that a new benefit plan would be better than the Union’s. That evening Vozza called Benson and told him to report to a jobsite at Washington High School the following morning which Benson did. After less than one-half day’s work, Vozza sent Benson home, saying he had been sent to the wrong jobsite. When he arrived home, Benson called Vozza who directed him to a jobsite at the McCormick Railroad Park. Before reporting there, Benson called a Union official who told him to report as ordered and act as the Union’s eyes and ears. Benson did so and worked for about 3 weeks on that project until he joined the strike which began on November 5/6.

I will recommend dismissal of this allegation in that there is no credible evidence that the work to which Benson was sent was more onerous or secluded than he had done before. In fact, it was to the Union’s advantage to have Benson on the new worksite as he was designated a union salt. Finally, at 25 of his brief, the General Counsel writes, the record is devoid of any evidence regarding Respondent’s justification for transferring Benson. In the absence of such evidence, I find valid work-related reasons implied. In sum, there is no evidence the transfer was anything but routine.

#### 6. Alleged entitlement to attorney’s fees and expenses

The Charging Party raises a single issue in its brief: its alleged entitlement to the awarding of costs and expenses. In *KIMA-TV*,

<sup>4</sup> Although Respondent has prevailed on this issue, I note that its argument that only 5 out of 20 alleged discriminatees actually testified and therefore the 15 nonwitnesses should be dismissed is without merit. See *Morton Metal Works*, 310 NLRB 195 (1993); *Ironworkers Local 433*, 298 NLRB 35, 36 (1990).

<sup>5</sup> That the unilateral change affected only a single employee is no defense. *Carpenters Local 1031*, 321 NLRB 30, 32 (1996).

324 NLRB 1148 (1997), the Board reversed the awarding of costs and expenses by the judge and explained its rationale:

[T]he assessment of costs against a respondent is an extraordinary remedy not ordinarily imposed (citations omitted). As long as the defenses raised by the respondent are “debatable” rather than “frivolous,” this remedy is inappropriate, even where the Respondent has engaged in “clearly aggravated and persuasive misconduct . . . .

Like the Board in *KIMA-TV*, I find that under the standard quoted above, and after reviewing the case as a whole, extraordinary remedies are not warranted.

If Respondent’s failure to make timely payments to the union’s trust funds and its failure to make timely payments of union dues were the sole issues in the case, I might be inclined to see the issue differently. However, there are other issues which involved credibility of witnesses including Voza and Belanger. In all or most instances, I have resolved the credibility issues against Respondent. However, I do not find the testimony presented by Respondent’s witnesses to be so insubstantial or unsupported as to be patently frivolous. *KIMA-TV*, supra, 324 NLRB 1148 (citations omitted). Moreover, I have recommended dismissal of two major allegations.

In final support of my conclusion, I note that Respondent’s financial shortfalls were caused in whole or in part by the failure of its general contractors to make timely payments to Respondent, that such circumstances, while not a legal defense to the unfair labor practices herein, cast the equities with respect to the awarding of costs away from Charging Party and toward Respondent. For all the reasons stated, I will recommend against Charging Party’s request.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. At all times material to these proceedings, the Union has been the exclusive collective-bargaining representative of the employees of the Respondent described in the Section titled “Coverage” of the Inside Agreement between the Arizona Chapter (National Electrical Contractors Association, Inc.) and Local Union 640 (IBEW) that expired on September 1, 1997.

3. By failing to make timely payments to the union’s trust funds, by failing to make timely payments to the Union of union dues, by withdrawing recognition from the Union, by repudiating the collective-bargaining agreement and by unilaterally reducing the wages of a bargaining unit employee, Respondent violated Section 8(a)(1) and (5) of the Act.

4. By laying off employees Jerry Howe, Jeffrey Rasmussen, and Samuel Gladden, because they elected to remain members of and to continue their support for the Union, Respondent violated Section 8(a)(1) and (3) of the Act.

5. The strike in this case is an unfair labor practice strike.

6. By interrogating bargaining unit employees about their union sympathies and their desire to remain with the company

after it went nonunion, and by threatening to discharge employees who supported the Union, Respondent violated Section 8(a)(1) of the Act.

7. The Charging Party is not entitled to attorney’s fee and expenses.

8. Violations found here are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. Respondent did not otherwise violate the Act as alleged in the complaint.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) by laying off Howe, Rasmussen, and Gladden because they elected to remain members of and to continue their support for the Union, I shall recommend that Respondent be ordered to offer those employees reinstatement to their former jobs or, to substantially equivalent employment, discharging if necessary any replacements. I shall also recommend that Respondent be ordered to make those employees whole for any loss of earnings and other benefits incurred from the date of their layoffs to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

Having also found that the Respondent violated Sections 8(a)(5) and (1) by unilaterally changing the terms and conditions of employment of employees in the unit without first bargaining with the Union in good faith to a valid impasse, I shall recommend that Respondent be ordered to rescind the unilateral changes and to make the employees whole for any losses of wages and benefits they may have incurred as a result of the unilateral changes, as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf’d. 444 F.2d 502 (6th Cir. 1971). I shall also recommend that Respondent be ordered to remit all payments it owes to employee pension and health care funds, apprentice funds, receiving & administration fund and the national electrical benefit fund, and all payments it owes the Union for union dues, with interest, as provided in *Merryweather Optical Co.*, 240 NLRB 1213 (1979),<sup>6</sup> and to make the employees whole for any expenses they may have incurred as a result of the Respondent’s failure to make such payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enf’d. mem. 661 F.2d 940 (9th Cir. 1981).

All make-whole payments to employees shall be made with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

<sup>6</sup> Respondent shall be permitted to offset any payments due and owing to the union’s trust funds pursuant to settlement of a Federal lawsuit discussed in this decision.